Sharil @ Shahrir bin Ab Samad v Tommy Thomas @ Mohan a/l K Thomas & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCvC-86–12 OF 2023
ROZ MAWAR JC
3 JULY 2024

Civil Procedure — Striking out — Application for — First defendant applied to strike out plaintiff's suit against defendants — Claim of abuse of power through malicious prosecution and misfeasance by defendants against plaintiff — Whether civil claim of malicious prosecution and misfeasance in public office could be maintained against Attorney General in light of art 145(3) of Federal Constitution — Whether plaintiff had pleaded sufficient particulars to establish reasonable cause of action

The plaintiff was an active member of UMNO from 1973 to 2023 and a member of Parliament for Johor Bahru from 1978 to 1990 and 2004 to 2018. In 2013, the plaintiff used over RM1m of his personal savings to revive an abandoned low-cost housing project called Puri Langkasuka in Larkin, Johor Bahru. Towards the end of 2013, the plaintiff sought financial assistance from the then UMNO President, Dato' Seri Najib Razak, to recover his personal money and fund the project. Dato' Seri Najib gave the plaintiff a cheque for RM1m as reimbursement. After the 14th General Election on 9 May 2018, the first defendant was appointed as Attorney General and the second defendant was appointed Chief Commissioner of the Malaysian Anti-Corruption Commission ('MACC'). Many UMNO politicians were then investigated by the MACC. On 23 September 2019, a MACC officer lodged a report alleging that the plaintiff was involved in money laundering by receiving RM1m linked to 1MDB funds. The plaintiff was arrested and charged under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds to Unlawful Activities Act 2001 for failing to declare the RM1m received from Dato' Seri Najib as income. During the trial, the prosecution's own witnesses revealed that the investigation papers were incomplete when the plaintiff was charged, the investigating officer admitted the investigations were incomplete, and a witness from the Inland Revenue Board of Malaysia stated many steps were required to ascertain if the RM1m was the plaintiff's income but this was not done before charging the plaintiff. After the prosecution's case, the Deputy Public Prosecutor informed the court that the prosecution was withdrawing the charge. The court then acquitted and discharged the plaintiff. The plaintiff filed this suit seeking declarations that the defendants were liable for malicious investigation, wrongful arrest, malicious prosecution, and misfeasance in public office. The first defendant applied to strike out the plaintiff's suit

pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The grounds advanced by the first defendant were that the plaintiff's claim disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was an abuse of the process of the court or was otherwise unsustainable by law.

Held, dismissing the first defendant's application:

(1) *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 did not stand as authority that the Attorney General's discretion could only be challenged by way of judicial review. The present action for malicious prosecution did not seek to nullify the charge proffered, but rather sought declarations and damages for the alleged abuse of prosecutorial power. Judicial review was therefore unnecessary and impractical given that the charge had been conclusively disposed of in the plaintiff's favour. Moreover, prosecutorial discretion could be judicially reviewed on grounds of mala fide and hence a freestanding civil claim premised on malice should similarly be permissible. Prosecutorial immunity could not be absolute and must yield in exceptional cases where prosecutorial power had been abused for improper motives. Claims for malicious prosecution and misfeasance in public office could lie against the Attorney General in appropriate cases and it was not a legal position contrary to art 145(3) of the Federal Constitution (see paras 10–11 & 13).

(2) The essential elements for malicious prosecution had been properly particularised. The plaintiff had pleaded that the first defendant set the criminal law in motion against him by consenting to the charge, that there was no reasonable or probable cause for the charge, that the first defendant was actuated by malice or improper purpose, that the proceedings terminated in the plaintiffs favour through an acquittal, and that the plaintiff suffered damage to his reputation. The particulars pleaded for misfeasance were likewise sufficient. The plaintiff's pleadings particularising the purported first defendant's improper motives, deliberate failure to scrutinise the investigation, and hasty decision to charge despite incomplete papers, amply established a reasonable cause of action for misfeasance in public office. The various specific particulars pleaded by the plaintiff cumulatively raised a serious prima facie case of abuse of power warranting a trial. Moreover, the first defendant's own admissions in his published book titled 'My Story — Justice in the Wilderness' constituted prima facie evidence of such improper motives. They established a prima facie case that the prosecution was tainted by bad faith and improper motives, rather than based on objective and complete investigations (see paras 19, 22–23 & 29–30).

[Bahasa Malaysia summary

Plaintif adalah ahli aktif UMNO dari 1973 hingga 2023 dan merupakan ahli Parlimen untuk Johor Bahru dari 1978 hingga 1990 dan dari 2004 hingga 2018. Pada tahun 2013, plaintif menggunakan lebih RM1 juta daripada simpanan peribadinya untuk menghidupkan kembali projek perumahan kos rendah yang terabai bernama Puri Langkasuka di Larkin, Johor Bahru. Menjelang akhir tahun 2013, plaintif memohon bantuan kewangan daripada Presiden UMNO ketika itu, Dato' Seri Najib Razak, untuk mendapatkan kembali wang peribadinya dan membiayai projek tersebut. Dato' Seri Najib memberikan plaintif cek berjumlah RM1 juta sebagai bayaran ganti. Setelah Pilihan Raya Umum ke-14 pada 9 Mei 2018, defendan pertama dilantik sebagai Peguam Negara dan defendan kedua dilantik sebagai Ketua Pesuruhjaya Suruhanjaya Pencegahan Rasuah Malaysia ('MACC'). Ramai ahli politik UMNO kemudiannya disiasat oleh MACC. Pada 23 September 2019, seorang pegawai MACC membuat laporan mendakwa bahawa plaintif terlibat dalam pengubahan wang haram dengan menerima RM1 juta yang berkaitan dengan dana 1MDB. Plaintif ditangkap dan didakwa di bawah s 4(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 kerana gagal mengisytiharkan RM1 juta yang diterima daripada Dato' Seri Najib sebagai pendapatan. Semasa perbicaraan, saksi-saksi pihak pendakwaan sendiri mendedahkan bahawa kertas siasatan tidak lengkap ketika plaintif didakwa, pegawai penyiasat mengakui bahawa siasatan belum selesai, dan seorang saksi dari Lembaga Hasil Dalam Negeri Malaysia menyatakan bahawa banyak langkah diperlukan untuk memastikan sama ada RM1 juta itu adalah pendapatan plaintif tetapi ini tidak dilakukan sebelum mendakwa plaintif. Selepas kes pendakwaan, Timbalan Pendakwa Raya memaklumkan mahkamah bahawa pendakwaan menarik balik pertuduhan tersebut. Mahkamah kemudiannya membebaskan dan melepaskan plaintif. Plaintif memfailkan tindakan ini untuk mendapatkan pengisytiharan bahawa defendan bertanggungjawab atas siasatan berniat jahat, penangkapan salah, pendakwaan jahat, dan penyalahgunaan kuasa dalam jawatan awam. Defendan pertama memohon untuk membatalkan tuntutan plaintif menurut A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012. Alasan yang dikemukakan oleh defendan pertama adalah bahawa tuntutan plaintif tidak menunjukkan kausa tindakan yang munasabah, mengaibkan, remeh atau menyusahkan, dan merupakan penyalahgunaan proses mahkamah atau tidak boleh dipertahankan oleh undang-undang.

Diputuskan, menolak permohonan defendan pertama:

(1) *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 tidak boleh menjadi autoriti yang menyatakan bahawa budi bicara Peguam Negara hanya boleh dicabar melalui semakan kehakiman. Tindakan semasa untuk pendakwaan jahat tidak bertujuan untuk membatalkan pertuduhan yang dibuat, tetapi

sebaliknya memohon pengisytiharan dan ganti rugi bagi penyalahgunaan kuasa pendakwaan yang didakwa. Oleh itu, semakan kehakiman adalah tidak perlu dan tidak praktikal memandangkan pertuduhan tersebut telah selesai dengan memihak kepada plaintif. Selain itu, budi bicara pendakwaan boleh disemak secara kehakiman berdasarkan alasan mala fide dan oleh itu tuntutan sivil yang berdiri sendiri berasaskan niat jahat juga harus dibenarkan. Kekebalan pendakwaan tidak boleh bersifat mutlak dan mesti mengalah dalam kes-kes luar biasa di mana kuasa pendakwaan telah disalahgunakan untuk niat yang tidak wajar. Tuntutan untuk pendakwaan jahat dan penyalahgunaan kuasa dalam jawatan awam boleh dibawa terhadap Peguam Negara dalam kes-kes yang sesuai dan ini tidak bertentangan dengan posisi undang-undang menurut perkara 145(3) Perlembagaan Persekutuan (lihat perenggan 10–11 & 13).

(2) Unsur-unsur penting untuk pendakwaan jahat telah diperincikan dengan betul. Plaintif telah mendakwa bahawa defendan pertama memulakan undang-undang jenayah terhadapnya dengan memberi persetujuan kepada pertuduhan, bahawa tiada sebab munasabah atau kemungkinan untuk pertuduhan tersebut, bahawa defendan pertama didorong oleh niat jahat atau tujuan yang tidak betul, bahawa prosiding berakhir memihak kepada plaintif melalui pembebasan, dan bahawa plaintif mengalami kerosakan kepada reputasinya. Perincian yang dikemukakan untuk penyalahgunaan kuasa juga adalah mencukupi. Pernyataan plaintif yang memperincikan niat tidak wajar yang didakwa defendan pertama, kegagalan sengaja untuk menyemak siasatan, dan keputusan tergesa-gesa untuk mendakwa walaupun kertas siasatan tidak lengkap, dengan jelas membentuk kausa tindakan yang munasabah untuk penyalahgunaan kuasa dalam jawatan awam. Pelbagai perincian khusus yang dikemukakan oleh plaintif secara kolektif membangkitkan kes prima facie yang serius mengenai penyalahgunaan kuasa yang memerlukan perbicaraan. Tambahan pula, pengakuan defendan pertama dalam bukunya yang diterbitkan bertajuk 'My Story — Justice in the Wilderness' merupakan keterangan prima facie mengenai niat tidak wajar tersebut. Ia membuktikan kes prima facie bahawa pendakwaan tersebut dicemari oleh niat jahat dan tujuan yang tidak wajar, dan bukannya berdasarkan siasatan yang objektif dan lengkap (lihat perenggan 19, 22–23 & 29–30).]

Cases referred to

Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors [2015] 7 MLJ 763, HC (refd)

Elguzouli-Daf v Comr of Police of the Metropolis and another; McBrearty v Ministry of Defence and others [1995] 1 All ER 833, CA (refd)

Gouriet v Union of Post Office Workers and Others [1977] QB 729, CA (refd)

Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Mahan Singh Karam Singh v Chanan Singh Sher Singh [1956] 1 WLR 781 (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Riches v Director of Public Prosecutions [1973] 2 All ER 935, CA (refd)
Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors [2014] 11 MLJ 481, HC (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (distd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)
Federal Constitution art 145(3)
Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(d)

Syed Faisal Al-Edros (with Syahrul Syazwan Salehin, Woo J Enn, Firoz Hussein, Iqbal Harith Liang, Firdaus Danial and Harel Nieryan (Pupil in Chambers)) (Fahri, Azzat & Co) for the plaintiff.
Alan Adrian Gomez (with Merlyn Lai Wei Shiung, Haikaldin Mahyidin and Yap Xue You (Pupil in Chambers)) (Tommy Thomas) for the first defendant.
Zetty Zurina Kamaruddin (with Siti Syakimah, Siti Norashikin and Syafiq Affandy) (Senior Federal Counsel, Attorney General's Chambers) for the second defendant.

Roz Mawar JC:

INTRODUCTION

[1] With the filing of this suit by the plaintiff, this court is called upon to consider whether the first defendant when he was the Attorney General, in exercising his vast powers under art 145(3) of our Federal Constitution ('the FC'), is wholly immune for legal accountability. The plaintiffs claim, which alleges grave abuse of that power through malicious prosecution and misfeasance, raises profound questions that strike at the very heart of our constitutional order. The answers this court gives will have far-reaching

consequences, not just for the parties before it, but for the integrity and repute of our entire system of justice. Mindful of the weight of this responsibility, this court turned now to the issues at hand.

[2] Through encl 13, the first defendant applied to strike out the plaintiffs suit pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the ROC'). The grounds advanced by the first defendant are that the plaintiffs claim disclosed no reasonable cause of action, is scandalous, frivolous or vexatious and is an abuse of the process of the court or is otherwise unsustainable by law. The main issues that arise for consideration are:

(a) whether a civil claim of malicious prosecution and misfeasance in public office can be maintained against the Attorney General in light of art 145(3) of the FC?

(b) if such claims are maintainable, whether the plaintiff has pleaded sufficient particulars to establish a reasonable cause of action? and

(c) whether there are conflicts of material evidence that render a striking out inappropriate at this stage?

THE PLAINTIFFS CLAIM

[3] Based on the pleadings, the factual matrix of the plaintiffs claim for malicious prosecution can be summarised as follows:

(a) the plaintiff was an active member of UMNO and held various political positions from 1973 to 2023. He was also the member of Parliament for Johor Bahru from 1978 to 1990 and 2004 to 2018 (paras 9–11 of statement of claim (SOC));

(b) in 2013, the plaintiff used his personal savings of over RM1m to revive an abandoned low-cost housing project called Puri Langkasuka in Larkin, Johor Bahru to help the affected purchasers (paras 13–14 SOC);

(c) towards the end of 2013, the plaintiff met with the then UMNO President, Dato' Seri Najib Razak, to seek financial assistance to recover his personal money used for the revival and to fund the continued revival works. Dato' Seri Najib gave the plaintiff a cheque for RM1m as reimbursement and to fund the continued revival (paras 17–18 SOC);

(d) after Pakatan Harapan won the 14th General Election on 9 May 2018, the first defendant was appointed as Attorney General while the Second defendant was appointed Chief Commissioner of Malaysian Anti-Corruption Commission ('MACC'). Many UMNO politicians were then investigated by MACC (paras 19–21 SOC);

(e) on 4 July 2019, MACC recorded the plaintiffs statement where he explained that the RM1m received from Dato' Seri Najib was a

reimbursement of his expenses for the Puri Langkasuka project (para 23 SOC);

(f) on 23 September 2019, MACC officer lodged a report alleging that the plaintiff was involved in money laundering by receiving RM1m linked to 1MDB funds (para 24 of SOC);

(g) on 7 October 2019, MACC held a press conference announcing that it had issued compound notices to 80 individuals and entities believed to have received funds linked to 1MDB, including the plaintiff, to pay a fine of 2.5 times the amount received (para 26 of SOC);

(h) on 20 January 2020, the plaintiff was arrested by MACC. On 21 January 2020, the plaintiff was charged in the Kuala Lumpur Sessions Court under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') for failing to declare the RM1m received from Dato' Seri Najib as income (paras 30–31 SOC);

(i) during the trial at the High Court, the prosecution's own witnesses gave revelations, including:

(i) the investigation papers (IP) were incomplete when the plaintiff was charged;

(ii) the investigating officer (IO) himself admitted the investigations were incomplete;

(iii) the witness from the Inland Revenue Board of Malaysia (LHDN) stated many steps were required to ascertain if the RM1m was the plaintiffs income but this was not done before charging the plaintiff (paras 34–35 SOC).

(j) on 5 January 2023, after the prosecution's case, the deputy public prosecutor informed the court that the prosecution was withdrawing the charge. The court then acquitted and discharged the plaintiff (para 38 SOC).

[4] The reliefs sought by the plaintiff include declarations that the defendants jointly and/or severally conducted and are liable for the malicious investigation, wrongful arrest, malicious prosecution and misfeasance in public office against the plaintiff. Amongst the reliefs the plaintiff sought are compensation of RM10m for the plaintiffs mental torture and damage to reputation, or general damages to be assessed.

[5] If he proves successful at trial, his claims are also for aggravated and/or exemplary damages of RM10m or to be assessed. The plaintiff further sought

for the defendants to mete unconditional apology in major newspapers (para 47 SOC).

THE DEFENCES RAISED

[6] The first defendant's defence essentially stated:

(a) the claim disclosed no cause of action against the first defendant as Attorney General who was exercising his prosecutorial discretion;

(b) the first defendant was briefed by the investigators, personally read the investigation papers and was satisfied there was a good case to prosecute the plaintiff before deciding to charge him;

(c) even after the first defendant resigned in February 2020, his successor as Attorney General continued with the prosecution until January 2023, showing the charge had merits; and

(d) the first defendant claims the suit is an abuse of process for ulterior purposes as he merely preferred the charge as Attorney General under the Pakatan Harapan government.

[7] The second to the fourth defendants' defence pleaded as follows:

(a) the second defendant carried out her duties lawfully as a public officer;

(b) all actions by the second to fourth defendants were lawful and there was no element of bad faith; and

(c) the unfettered prosecutorial discretion of the Attorney General and public prosecutor is non-justiciable.

[8] In summary, the plaintiffs claim is for malicious prosecution on the basis that he was wrongly investigated and charged when the investigations were incomplete. The defendants all disputed this and contended they acted lawfully without malice or bad faith in investigating and prosecuting the plaintiff.

THE DEFENDANTS' STRIKING OUT APPLICATION UNDER O18 R 19(1)(a), (b), (d) OF THE ROC: ARGUMENTS AND ASSESSMENT

Whether claims of malicious prosecution and misfeasance can lie against the Attorney General

[9] A key contention of the first defendant is that art 145(3) of the FC, which provides the Attorney General discretionary power to institute, conduct or discontinue criminal proceedings, immunises him from any civil claims arising from the exercise of that power. It is argued that the recent Federal

Court decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 only allows judicial review of prosecutorial discretion in rare and exceptional circumstances, and is thus the only recourse available to the plaintiff. The following passage of the Federal Court's judgments was highlighted:

> The AG/PP did not have absolute or unfettered discretion under art 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for a criminal offence. In appropriate, rare and exceptional cases, such discretion was amendable to judicial review. The evidence in the instant case led to no other conclusion but that the AG/PP knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the AG/PP decided to charge the appellant. A clear and direct indication of this was the AG/PP's issuance of his consent to prosecute the appellant in spite of the letter from the Secretary-General of AALCO of even date indicating that the first and second respondents had separately requested for an ad hoc waiver of the appellant's immunity and those requests were denied (see para 112 & 122).

[10] However, upon careful analysis of *Sundra Rajoo*, this court finds that it does not stand as authority that the Attorney General's discretion can *only* be challenged by way of judicial review. Firstly, the action in *Sundra Rajoo* sought to declare the charge proffered as a nullity, and thus invoked the court's supervisory jurisdiction. In contrast, the present action for malicious prosecution does not seek to nullify the charge proffered, but rather seeks declarations and damages for the alleged abuse of prosecutorial power. Judicial review is therefore unnecessary and in fact impractical given that the charge has been conclusively disposed of in the plaintiffs favour.

[11] Moreover, *Sundra Rajoo* itself held that mala fide is one of the traditional grounds for judicial review of the Attorney General's discretion. Given that malice is also central to the tort of malicious prosecution, it follows that if prosecutorial discretion can be judicially reviewed on grounds of mala fide, a freestanding civil claim premised on malice should similarly be permissible.

[12] The first defendant's contention on absolute prosecutorial immunity drawn from the common law is also unpersuasive. Even under English common law, courts have recognized the feasibility of malicious prosecution claims notwithstanding such immunity (see *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 and *Elguzouli-Daf v Comr of Police of the Metropolis and another; McBrearty v Ministry of Defence and others* [1995] 1 All ER 833). More pertinently, the High Court in several local cases like *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors* [2014] 11 MLJ 481 and *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763 has categorically held that the Attorney General enjoys no absolute immunity from suit for malicious prosecution.

[13] The first defendant has not provided any cogent reason to depart from these authorities. On the contrary, this court finds the detailed reasoning in these judgments, drawing from developments in other Commonwealth jurisdictions, highly persuasive. Prosecutorial immunity cannot be absolute and must yield in exceptional cases where prosecutorial power has been abused for improper motives. To hold otherwise would place the Attorney General completely above the law. As such, this court holds that claims for malicious prosecution and misfeasance in public office can lie against the Attorney General in appropriate cases and it is not a legal position contrary to art 145(3) of the FC.

[14] In the arguments, the first defendant had strongly contended that prosecutorial discretion under art 145(3) of the FC is non-justiciable, meaning it is beyond the purview of the courts to review. This argument draws from a long line of authorities like *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66, and *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 which have held that the Attorney General's discretion is absolute and not subject to judicial interference.

[15] However, this position must now be re-evaluated in light of the Federal Court's groundbreaking decision in *Sundra Rajoo*. There, the apex court held that while art 145(3) of the FC confers wide discretion, it does not make the Attorney General completely immune from judicial review. In appropriate cases, the courts can review the exercise of prosecutorial discretion on established grounds like illegality, irrationality and procedural impropriety. Significantly, the court recognised bad faith or mala fide as one of the grounds for judicial review of prosecutorial discretion. This aligns with the fundamental principle that power must not be abused, and that discretion, however broad, can never be unfettered under a system of constitutional supremacy. As Raja Azlan Shah J (as His Lordship then was) memorably stated in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135:

> ... every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

[16] Seen in this light, the non-justiciability argument no longer presents an insurmountable hurdle. If prosecutorial discretion can be reviewed on grounds of bad faith, there is no reason in principle why a civil claim founded on malice

cannot be maintained. The law must provide a remedy where legal wrongs are committed, even by the highest legal officer. To hold otherwise would enshrine a most repugnant form of double standards. Lord Denning's famous aphorism in *Gouriet v Union of Post Office Workers and Others* [1977] QB 729 is applicable here:

> ... be you ever so high, the law is above you. It is no defence for a person to say: 'I am the Attorney-General and the courts cannot make a declaration against me' ... If he does not act in accordance with the law, the courts can say so ... If he does not act properly and lawfully, the courts can make a declaration to that effect ...

[17] While the first defendant relied on this case to argue for non-justiciability, the quoted passage actually supports the vital point that the Attorney General is not above the law. Where the Attorney General has demonstrably not acted 'properly and lawfully', the courts have a duty to say so. That duty cannot be diluted or abdicated on an expansive notion of non-justiciability. Ultimately, the question is not whether prosecutorial discretion is totally immune from review, but whether the plaintiff has established a prima facie case of abuse deserving of a full inquiry. As elaborated in this judgment, this court is satisfied that the plaintiff has crossed that threshold through its pleadings and also affidavit evidence. See *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697.

[18] In such circumstances, it would be a dereliction of judicial duty to summarily scuttle the claim without a trial. The allegations are grave and troubling enough that public confidence would be undermined if they are not properly investigated. Striking out would be an affront to the constitutional imperative of upholding the rule of law without fear or favour.

Whether the plaintiff has pleaded sufficient particulars

[19] The next issue is whether the plaintiffs pleadings disclose sufficient particulars to establish a reasonable cause of action. Upon examining the SOC, this court is satisfied that the essential elements for malicious prosecution have been properly particularised. The plaintiff has pleaded that the first defendant set the criminal law in motion against him by consenting to the charge, that there was no reasonable or probable cause for the charge, that the first defendant was actuated by malice or improper purpose, that the proceedings terminated in the plaintiffs favour through an acquittal, and that the plaintiff suffered damage to his reputation.

[20] While the first defendant argued these are bare allegations, the plaintiff has in fact pleaded specific particulars, including the first defendant's

statements showing political bias in his autobiography, his supposedly interference with MACC investigations despite being informed there was no wrongdoing, his failure to ensure complete investigation papers before charging, and the startling revelations by prosecution witnesses during trial that demolished the basis for the charge. These are not mere assertions, but detailed factual averments pleaded.

[21] It must be emphasized here that whether the plaintiff will be successful in establishing his claim on a balance of probabilities is for this court to determine after trial. When all the evidence is adduced, this court then will make the findings. At this juncture, it is not for this court to decide the strength of the plaintiff's suit. It is sufficient that the facts contended to fulfill the ingredients of the cause of action are pleaded.

[22] The particulars pleaded for misfeasance are likewise sufficient. The tort of misfeasance, aimed at preventing abuse of public power, requires establishing that a public officer acted with targeted malice or reckless indifference in abusing his power. The plaintiffs pleadings particularising the purported first defendant's improper motives, deliberate failure to scrutinise the investigation, and hasty decision to charge despite incomplete papers, amply establish a reasonable cause of action for misfeasance in public office.

[23] Given that malice is the central thread connecting these causes of action, the various specific particulars pleaded by the plaintiff cumulatively raised a serious prima facie case of abuse of power warranting a trial. At the very least, they cannot be said to be obviously unsustainable to justify a striking out at this stage.

[24] Thus, having first considered the first defendant's application to strike out under limb r 19(1)(a) of the ROC which is the assessment of the pleadings, this court is not satisfied that the plaintiffs claim ought to be struck out summarily.

Whether there are conflicts of material evidence

[25] Finally, even if there is doubt about the adequacy of the pleadings, the present application must fail due to clear conflicts on material facts and evidence. It is trite that a striking out application should not be allowed where there are factual conflicts that require a trial for determination. Here, the affidavit evidence revealed obvious conflicts on key issues like the first defendant's alleged pressuring of MACC investigations, the incomplete state of the investigation papers, and the plaintiffs information to the authorities that

the RM1m was a reimbursement. The first defendant has largely made bare denials without properly addressing or refuting the plaintiffs specific averments.

[26] Critically, the first defendant has not adequately responded to the shocking testimonies of prosecution witnesses SP21 and SP22 in the prosecution trial against the plaintiff. The plaintiff contended that this exposed the flaws and improper basis for the charge against him. These testimonies, given on oath in open court, cannot be brushed aside and deserve to be tested by cross-examination. Given the centrality of this evidence, it would be highly prejudicial to deny the plaintiff the opportunity to establish his claim through *viva voce* evidence at trial.

[27] The book published by the first defendant, titled 'My Story — Justice in the Wilderness' greatly featured in this case. It plays a significant role in the plaintiffs contention of malicious prosecution. The plaintiff has relied on several statements and admissions made by the first defendant in the book to establish a prima facie case of improper motives and bad faith in the prosecution against him. Specifically, the plaintiff highlighted the following aspects from the book:

(a) the first defendant's admission that he remained a 'political lawyer' throughout his career — the plaintiff suggested a lack of impartiality;

(b) the first defendant's account of how he lobbied various political and legal figures to be appointed as Attorney General — the plaintiff viewed it as an indication of a political agenda;

(c) the first defendant's acknowledgment of his role in the efforts to topple the Barisan Nasional government, which the plaintiff was a part of, the plaintiff maintained revealed a potential bias of the first defendant against the plaintiff; and

(d) most critically, the first defendant's statements about pressuring the MACC to investigate the plaintiffs role in FELDA and FELCRA for purported wrongdoings, even after being told there was no evidence of any scandal. This suggests a targeted and predetermined effort to find wrongdoing by the plaintiff.

[28] These published statements, made by the first defendant himself for public consumption, lend substantial credence to the plaintiffs claim of malicious prosecution. The plaintiff in his pleadings painted a picture of an Attorney General who was not objective and neutral, but one who was actively seeking to uncover wrongdoing by political opponents through the use of prosecutorial power. On the surface, the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the

plaintiff despite incomplete investigations. They supported the inference that the prosecution was not driven by the merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff. This squarely fits the legal definition of malicious prosecution — the abuse of the criminal process for purposes other than the proper administration of justice. It is well established that proof of malice need not be direct, but can be inferred from all the circumstances pointing to the misuse of prosecutorial power. As stated in *Mahan Singh Karam Singh v Chanan Singh Sher Singh* [1956] 1 WLR 781:

> ... malice in the widest and vaguest sense ... is proved if the prosecution was instituted for some other and improper motive and not to secure the ends of justice.

[29] The first defendant's own admissions in his book constitute prima facie evidence of such improper motives. The fact that these statements were voluntarily published by the first defendant himself significantly bolsters their reliability and weight in supporting a finding of malice. At the very least, they raise grave questions about the integrity of the prosecution that cry out for a full and fair hearing. Shutting out such evidence without subjecting it to the acid test of cross-examination would be a severe miscarriage of justice. As the High Court held in *Rosli bin Dahlan*:

> ... the court is only concerned with whether facts are pleaded with sufficient particulars to give rise to such remedies and it would then have to go to trial for the plaintiff to establish his case.

[30] The first defendant's admissions in in the book, together with the troubling testimonies of the prosecution's own witnesses during trial, more than meet this threshold. They establish a prima facie case that the prosecution was tainted by bad faith and improper motives, rather than based on objective and complete investigations. It would be a travesty for the court to turn a blind eye to such weighty evidence and deny the plaintiff the opportunity to vindicate his claim at trial.

[31] This court acknowledges that our Attorney General must be in a position to carry out his constitutional obligations without the constant worry of looking over his shoulders for the reactive responses that blows onto his direction. However, in this exceptional instance, the first defendant's published statements in his book form a crucial plank of the plaintiffs case theory. They provide the clearest link between the alleged malice and the overt act of prosecution. The fact that this evidence comes from the first defendant's own pen makes it impossible to ignore or summarily discount. Seen holistically, they reinforce the case for allowing the claim to be ventilated at a full trial where the first defendant will have the opportunity to explain those statements and be tested by cross-examination. Only then can the truth be ascertained in accordance with the time-honoured adversarial process that is the hallmark of our justice system.

CONCLUSION

[32] For the above reasons, this court finds that the plaintiffs claim is not suitable for a striking out under any of the limbs of O 18 r 19(1). The claim is not obviously unsustainable, vexatious or an abuse of process. On the contrary, based on the pleadings and affidavit evidence, it discloses a reasonable cause of action that plainly deserves to be tried.

[33] Our legal system, founded on the rule of law, requires that no one be placed above the law, not even the Attorney General. The recent apex court decision in *Sundra Rajoo* recognising that prosecutorial discretion is not unfettered reaffirms this sacred constitutional principle. Where credible allegations are raised that such discretion has been abused for improper motives, the aggrieved accused must be given an opportunity to prove his case in accordance with the law.

[34] The facts and circumstances of how the plaintiff came to be charged and then acquitted are troubling and cry out for investigation. The evidence reveals unsettling suggestions of hasty and selective prosecution without proper basis. Public confidence in the administration of justice would be undermined if such serious averments are shut out without being ventilated through the curial process. In conclusion, the balance of justice and the wider public interest mandate that this case be allowed to proceed. The first defendant's application is therefore dismissed. Costs will be in the cause. The plaintiff shall be given his day in court to prove his claim as he is entitled to under the law.

First defendant's application dismissed.

Reported by Nabilah Syahida Abdullah Salleh